Mohd Roziman bin Saaidon & Anor v Public Prosecutor

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPLICATION NO 44–12–04 OF 2015
MOHD SOFIAN J
14 OCTOBER 2015

Administrative Law — Legislation — Retrospective effect — Whether amendments introduced by Dangerous Drugs (Amendment) Act 2014 to s 31A(1AA) of the Dangerous Drugs Act 1952 retrospective in nature — Whether only prospective application — Whether applicable to offences committed prior to the amendment

Constitutional Law — Legislation — Retrospective effect — Whether amendments introduced by Dangerous Drugs (Amendment) Act 2014 to s 31A(1AA) of the Dangerous Drugs Act 1952 retrospective in nature — Whether only prospective application — Whether applicable to offences committed prior to the amendment

Statutory Interpretation — Legislation — Retrospective effect — Whether amendments introduced by Dangerous Drugs (Amendment) Act 2014 to s 31A(1AA) of the Dangerous Drugs Act 1952 retrospective in nature — Whether only prospective application — Whether applicable to offences committed prior to the amendment

The applicants were charged before the magistrate's court under s 15(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The examination and analysis on the urine samples of the applicants were carried out by the science officer. Upon the prosecution's application, the magistrate's court ordered the charges against the applicants be discharged not amounting to an acquittal ('DNAA'). This came about because of the decision in *Yusri Yahya v Public Prosecutor* vide Case No 4P06808201 of 2011 on 28 June 2013 where the Court of Appeal held that the urine specimen examination and analysis must be conducted by a medical officer and that a science officer has no jurisdiction to conduct examination and analysis of the urine specimen. However, pursuant to amendments introduced by the Dangerous Drugs (Amendment) Act 2014 ('the Amendment Act'), s 31A(1AA) of the DDA now provides that any biological sample collected for the purposes of an examination under the section may be analysed by a science officer employed by the government. On 10 September 2014 the applicants were thus recharged for the same offence under s 15(1)(a) of the DDA. The prosecution relied on the new amended s 31A(1AA) in

respect of the urine test report of the applicants carried out by the science officer. The applicants contended that the Amendment Act is not retrospective as it came into effect on 15 February 2014. The applicants thus filed the present notice of application seeking, inter alia, for an order that the amended provision of s 31A(1AA) has no retrospective effect and for an order that the recharging of the applicants was void and unlawful.

Held, allowing the application:

(1) The Amendment Act is not retrospective but prospective and to interpret it otherwise would infringe art 7(1) of the Federal Constitution which states that no person shall be punished for an act or omission which was not punishable by law when it was done. If the case was to proceed for trial the evidence of the chemist report on the urine specimen of the applicants was inadmissible as it did not comply with s 31A(1A) of the DDA. Section 31A(1AA) of the Amended DDA 2014 was inapplicable as the offence committed was before the amendment had come into force (see para 29).

[Bahasa Malaysia summary

Pemohon-pemohon dituduh di hadapan mahkamah majistret di bawah s 15(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pemeriksaan dan analisa ke atas sampel air kencing pemohon-pemohon dijalankan oleh pegawai sains. Atas permohonan pihak pendakwaan, mahkamah majistret memerintahkan tuduhan terhadap permohon-pemohon dilepaskan tidak merupakan kepada pembebasan ('DNAA'). Ini berlaku kerana keputusan dalam kes *Yusri Yahya v Public Prosecutor* melalui Kes No 4P06808201 Tahun 2011 pada 28 Jun 2013 di mana Mahkamah Rayuan memutuskan bahawa pemeriksaan spesimen air kencing dan analisa mesti dijalankan oleh pegawai perubatan dan bahawa pegawai sains tidak mempunyai bidang kuasa untuk menjalankan pemeriksaan dan analisa specimen air kencing. Walau bagaimanapun, berikutan pindaan yang diperkenalkan oleh Akta Dadah Berbahaya (Pindaan) 2014 ('Akta Pindaan'), s 31A(1AA) ADB sekarang ini memperuntukkan bahawa mana-mana sampel biologi yang dipungut untuk tujuan pemeriksaan di bawah section tersebut boleh dianalisa oleh pegawai sains yang bekerja dengan Kerajaan. Pada 10 September 2014 pemohon-pemohon oleh itu dituduh semula bagi kesalahan yang sama di bawah s 15(1)(a) ADB. Pihak pendakwaan bergantung ke atas s 31A(1AA) baru yang dipinda berkaitan laporan ujian air kencing pemohon-pemohon yang dijalankan oleh pegawai sains. Pemohon-pemohon berhujah bahawa Akta Pindaan bukan retrospektif kerana ia berkuat kuasa pada 15 Februari 2014. Pemohon-pemohon oleh itu memfailkan notis permohonan ini memohon, antara lain, bagi perintah bahawa peruntukan pindaan s 31A(1AA) tidak mempunyai kesan retrospektif dan untuk perintah bahawa tuduhan semula terhadap pemohon-pemohon adalah batal dan salah dari segi undang-undang.

Diputuskan, membenarkan permohonan:

(1) Akta Pindaan adalah bukan retrospektif tetapi prospektif dan untuk mentafsirkan sebaliknya akan melanggar perkara 7(1) Perlembagaan Persekutuan yang menyatakan bahawa tiada orang akan dihukum bagi tindakan atau ketinggalan yang tidak boleh dihukum dari segi undang-undang apabila ia telah dilakukan. Jika kes diteruskan untuk perbicaraan keterangan laporan ahli kimia ke atas spesimen air kencing pemohon-pemohon tidak boleh diterima kerana ia tidak mematuhi s 31A(1A) ADB. Seksyen 31A(1AA) Akta Pindaan tidak boleh diguna pakai kerana kesalahan yang dilakukan adalah sebelum pindaan berkuat kuasa (lihat perenggan 29).]

Notes

For cases on legislation in general, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 2980–2999.

Cases referred to

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)
Johnson Tan Han Seng v PP; Soon Seng Sia Heng v PP; PP v Chea Soon Hoong; Teh Cheng Poh v PP [1977] 2 MLJ 66, FC (refd)
Kamarul Farkaruddin Mohamed lwn PP [2013] 7 CLJ 636, HC (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Samivellu v PP [1972] 1 MLJ 28 (refd)
Shahrizal bin Abdul Ghani v PP [2014] 1 MLJ 769, CA (refd)
Rina Simanjuntak v PP [2015] 3 MLJ 177, CA (refd)
Yusri Yahya v PP (Case No 4P06808201 of 2011) (unreported), CA (refd)
Zulkifli bin Md Rodzi v PP [2013] 3 MLJ 745; [2013] 3 AMR 263, CA (refd)

Legislation referred to

Criminal Procedure Code s 399, 399(2), (2)(c), (2)(f)
Dangerous Drugs Act 1952 ss 2, 15(1)(a), 31A, 31A(1A), (1AA), 37A
Evidence Act 1950 ss 45, 57(1)
Federal Constitution art 7, 7(1)

G Subramaniam (Maniam Nair & Co) for the applicants.
Rahimad bt Abd Majid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Sofian J:

[1] By way of a preliminary objection, this notice of application is filed by the applicants seeking the following reliefs namely:

(a) for an order that the amended provision of s 31A(1AA) of the Dangerous

Drugs (Amended) Act 2014 has no retrospective effect;

(b) for an order that the amended provision of s 31A(1AA) of the Dangerous Drugs (Amended) Act 2014 is not applicable to re-charge the applicants in respect of Criminal Trial No 82–2–09 of 2014;

(c) for an order that the re-charged of the applicants vide Criminal Trial No 82–2–09 of 2014 is void and unlawful as the original charge against the applicants in respect of Criminal Trial No 82–1(3) of 2013 had been DNAA on 25 July 2013;

(d) for an order that the re-charged of the applicants in respect of Criminal Trial No 82–2–09 of 2014 be struck-out as being unlawful because the original charge against the applicant in the Criminal Trial No 82–2(3) of 2013 was given a DNAA on 25 July 2013; and

(e) any other order deem appropriate by the honourable court.

THE BRIEF BACKGROUND OF THE CASE

[2] The applicants were arrested on 13 September 2013 and charged before the Magistrates Court Kulai, Johor Darul Takzim under s 15(1)(a) of the Dangerous Drugs Act 1952 ('the DDA 1952') vide Criminal Trial Nos 82–1(3) of 2013 and 82–2–(3) of 2013 on 4 March 2013 respectively. The examination and analysis on the urine samples of the applicants were carried out by the science officer. On 25 July 2013, the prosecution applied to the magistrates court for an order to have the charges against the applicants respectively be discharged not amounting to an acquittal ('DNAA') to which the court ordered that the charges against the applicants be DNAA. This came about because of the decision of the Court of Appeal in *Yusri Yahya v Public Prosecutor* (Case No 4P06808201 of 2011) on 28 June 2013. The Court of Appeal held that the urine specimen examination and analysis under s 31A (1AA) of the Dangerous Drugs (Amended) Act 2014 must be conducted by a medical officer as defined under the section which also includes the chemist. A science officer has no jurisdiction to conduct examination and analysis of the urine specimen. On 10 September 2014 the applicants were recharged for the same offence under s 15(1)(a) of the DDA 1952 vide Criminal Trial Nos 82–2–09 of 2014 and 82–3–09 of 2014 respectively. The prosecution intends to rely on the new amended s 31A(1AA) in respect of the urine test report of the applicants carried out by the science officer. Learned counsel for the applicants submitted that the Amended DDA 2014 is not retrospective as it came into effect on 15 February 2014.

THE CHARGES

[3] Criminal Trial No 82–2–09 of 2014 as against Mohd Roziman bin Saaidon:

Bahawa kamu pada 13.9.2012, jam lebih kurang 1510 hrs bertempat di Pejabat Bahagian Siasatan Jenayah Narkotik, IPD Kulaijaya didalam daerah Kulai, di dalam Negeri Johor, telah didapati memasukkan dadah berbahaya jenis Methamphetamine kedalam diri kamu sendiri. Oleh yang demikian kamu telah melakukan satu kesalahan dibawah Sekysen 15(1)(a) ADB, 1952 dan kamu boleh dihukum dibawah Seksyen dan Akta yang sama.

[4] Criminal Trial No 82–3–09 of 2014 as against Al 'Muhaimin bin Mohd Radzi:

Bahawa kamu pada 13.9.2012, jam lebih kurang 1650 hrs, bertempat di Pejabat Bahagian Siasatan Jenayah Narkotik, IPD Kulaijaya didalam daerah Kulai didalam Negeri Johor, telah didapati memasukkan dadah berbahaya jenis Methamphetamine kedalam diri kamu sendiri. Oleh yang demikian kamu telah melakukan satu kesalahan dibawah Seksyen 15(1)(a) ADB 1952 dan kamu boleh dihukum dibawah Seksyen dan Akta yang sama.

[5] Section 15 Self administration.

(1) Any person who –

(a) consumes, administers to himself or suffers any other person, contrary to section 14 tom administer to him any dangerous specified in Parts 111 and 1V of the First Schedule; or

(b) ...

shall be guilty of an offence against this Act and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years.

(2) For the purpose of this section, 'consumes' includes eat, chew, smoke, swallow, drink, inhale or introduce into the body in any manner or by any means whatsoever.

THE ISSUE BEFORE THE COURT

[6] Whether the amendment in s 31A(1AA) of the Dangerous Drugs (Amendment) Act 2014 is retrospective or prospective?

[7] It is perhaps useful to reproduce the wordings of s 31A(1A) of the Dangerous Drugs Act 1952 and the Amended s 31A(1AA) 2014 respectively for easy reference.

[8] Section 31A of the Dangerous Drugs Act 1952 states as follows:

31A Examination of arrested person by a medical officer.

(1) When any person is arrested on a charge of committing an offence against the Act –

(1A) For the purpose of preservation of evidence, it shall be lawful for a police officer not below the rank of Sergeant or an officer of customs to require an arrested person to provide a specimen of his urine for the purposes of an examination under subsection (1) if it is not practicable for the medical officer or the person who is acting in aid of or on the direction of a medical officer to obtain the specimen of the urine within a reasonable period.

(1B) ...

(2) For the purposes of this section 'medical officer' includes any person employed by the Government or a statutory authority as a medical officer or as a chemist.

[9] Amendment of s 31A:

3 The Dangerous Drugs Act 1952 (Act 234) which is referred to as the 'principal Act' in this Act, is amended in s 31A by inserting after sub–s (1A) the following subsection:

(1AA) Any biological sample collected for the purposes of an examination under this section may be analysed by a science officer employed by the overnment.

Date of publication in the *Gazette* – 14 February 2014.

SUBMISSION OF COUNSEL FOR THE APPLICANTS

[10] Learned counsel submitted that the amendment to s 31A(1A) cannot be retrospective as it would be ultra vires art 7 of the Federal Constitution which states as follows:

7 Protection against retrospective criminal laws and repeated trials.

(1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

(2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

[11] Learned counsel further submitted that if the amendment to s 31A was retrospective, it would negate the defence available at the time the alleged offence was committed. The defence was that the urine test on the sample taken from both applicants were carried out by a science officer pursuant to s

31A(1A) stipulates that the test on the urine sample must be carried out by a medical officer. In sub-s (2) of s 31A it states that for purposes of this section 'medical officer' includes any person employed by the government or a statutory authority as a medical officer or as a chemist.

[12] Learned counsel submitted that the test on the urine sample of the applicants was not done in compliance with s 31A(1A) of the DDA 1952 as a medical officer as envisaged does not include a science officer.

SUBMISSION OF THE RESPONDENT

[13] The learned deputy public prosecution ('learned deputy') in her brief written submission had only canvassed one argument that the amendment to s 31A(1A) is procedural in nature and it is not substantive. The learned deputy then cited a passage in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 which states as follows:

> ... on any legislation on evidence or on procedure, there is a twist of such rule of presumption, this time around, the presumption now is that such legislation is retrospective in operation in the absence of a contrary intention thereto by express words or necessary implication, subject to one exception as follows:
>
> The exception is that such presumptive retrospective operation would not apply when the effect of applying retrospectively such legislation on procedure or on evidence would be to deprive a person of a vested right in civil cases or in criminal cases when it would offend against art 7(1) of the Federal Constitution.

THE OBSERVATION AND FINDING OF THE COURT

[14] The court has had sight at the earlier charges against the applicants vide Criminal Trial No 82–1(3) of 2013 and Criminal Trial No 82–2(3) of 2013 and compared them to the present charges vide Criminal Trial No 82–2–09 of 2014 and Criminal Trial No 82–3–09 of 2014 respectively and found that the wordings of the earlier charges which had been DNAA by the magistrate court and the wordings of the present charges against the applicants for all intend and purposes are the same. The court found that the earlier charges against the applicant were DNAA because of the decision of the Court of Appeal decision in *Yusri Yahya v Public Prosecutor* case (No 4P06808201 of 2011) made on 28 June 2013. Unfortunately a copy of the said judgment was not made available by learned counsel who cited the case to the court. Be that as it may the absence of the judgment in *Yusri Yahya v Public Prosecutor* does not in any way affect the decision of the court as the court could rely on the interpretation of ss 31A(1A) and the amended section of s 31A(1AA).

[15] The court referred to the case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 where the brief facts were that the applicant was

charged in the sessions court with an offence of cheating which was alleged to have taken place on 7 May 1983. The sessions court acquitted and discharged the applicant at the close of the prosecution's case without his defence being called, employing the test of prima facie case as adopted in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492. On appeal, the High Court which heard the appeal in 1990 set aside the order of acquittal and ordered that the applicant be called for his defence. The applicant applied for leave to refer to the Supreme Court certain questions of law. The Supreme Court allowed the application in respect of the following questions: (i) in an appeal against acquittal at the close of the case of the prosecution, can an appellate judge refuse to apply with or without assigning any reason, the latest decision of the Supreme Court on a point of law and adopt an earlier decision of the Supreme Court (ii) whether the appellate court in hearing an appeal against acquittal at the close of the prosecution's case was right in holding that the sessions court was wrong in assessing and weighing the credibility, reliability and veracity of the prosecution witnesses. The Supreme Court then set aside the order of the High Court and restored the order of the sessions court.

[16] Supreme Court held by way of an obiter stated as follows:

> If question (ii) had been framed in the past tense so as to require an answer applicable in 1990 about the burden of proof at the close of the prosecution's case, but if it was cast in the present tense instead, then it is piquant that the sessions court would have been right in the assessing the reliability, etc of prosecution witnesses at the close of the prosecution 's case, because at the same time of the hearing of this reference, the burden of proof beyond a reasonable doubt at the close of the prosecution's case as enjoined by the ratio of *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 would be applicable.
>
> Moreover, although the Criminal Procedure Code has been amended to include the test of prima facie case, the amendment would apply only to an act or omission constituting a criminal offence committed on or after 31 January 1997 and not to such act or omission before 31 January 1997. For such act or omission committed before 31 January 1997, the test laid down in *Arulpragasan* ie that of proof beyond a reasonable doubt at the close of prosecution's case, would still apply because the amendment is not couched in terms either expressly or by necessary implication, which would make it retrospective in operation.

[17] The court in *Dalip Bhagwan Singh* also held that 'Assuming that the amendment to the CPC had been, expressly or by necessary implication, made to apply retrospectively, it would have run foul of art 7(1) of the Federal Constitution because if an act or omission before 31 January 1997 cannot evidentially be proved at the time to have been committed beyond reasonable doubt at the close of the prosecution's case, the perpetrator of the act or omission would not be called for his defence and therefore would not be punishable any more ... Article 7(1) of the Federal Constitution would thereby have been infringed, though very clearly in spirit if not by letter'.

[18] The court disagreed with the passage cited by the learned deputy from *Dalip Bhagwan Singh* case as the premised to say that the new amended s 31A(1AA) was procedural in nature and has a retrospective effect. The learned deputy has quoted the said passage without fully appreciating the spirit and rationale of the case. In fact if one will to read the said passage again, one would find that it can be retrospective subject to it not depriving a person of a vested right in civil or criminal cases when it would offend art 7(1) of the Federal Constitution.

[19] In *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 where it was stated that 'If so far as an Act of Parliament is concerned, the rule of construction is that in order to determine whether it is retrospective in its operation, the language of the Act itself must be looked into bearing in mind that an Act is not to be construed retrospectively unless it is clear that such was the intention of Parliament. If such was the intention that the Act is to be given retrospective effect even in respect of substantive right or pending proceeding, the courts have no alternative but to give effect to the Act even though the consequences might appear harsh and unjust'.

[20] The court was of the view that the language used in the Amended Act 2014 makes it abundantly clear that it was not to be read as retrospective as it infringes art 7(1) of the Federal Constitution. That being the case, the test conducted by the science officer on 18 October 2012 on the urine specimen of the applicants did not come within the meaning of 'medical officer' under the s 31A(1A) of the DDA 1952.

[21] On the same vein, the Court of Appeal in *Rina Simanjuntak v Public Prosecutor* [2015] 3 MLJ 177 was poised to decide on the issue which arose in the appeal as to whether the amended s 37A of the Dangerous Drug (Amendment) 2014 which came into force on 15 February 2014 similar to that of the coming into force of the amendment to s 31A(1A) of the DDA 1952 was retrospective or prospective. The case concerned the used of the double presumption of possession and trafficking under s 37A. The learned trial judge held that s 37A was applicable after the trial had commenced which means retrospective. The court held that the correct approach is to consider the time of the commission of the offence and not the commencement of the trial. The alleged offence was committed on 17 March 2013 whereas the amendment to insert s 37A came into effect on 15 February 2014. The court further held that the trial judge therefore erred in retrospective application of s 37A, in breach of art 7(1) of the Federal Constitution which provides for retrospective criminal laws.

[22] The court is also appraised of the fact that s 399 of the Criminal Procedure Code ('the CPC') does make provision of reports of certain upon

any person, mentioned in sub-s (2) of the of this section upon any matter or thing examined or analysed by him ... may be given in evidence in any inquiry, trial or other proceeding under this Code unless such person ... shall be required to attend as a witness by the court or by the accused. Subsection (2) of this section stipulates the persons to whom the provisions of this section apply:

(a) officers of the Institute for Medical Research;

(b) Government Medical Officers;

(c) chemists in the employment of any Government in the Federation or Government of Singapore;

(d) any person appointed by the (Minister) by notification in the Gazette, to be a Document Examiner;

(e) Inspector of Weights and Measures appointed as such under any written law relating to weights and measures in force in the (Federation; and);

(f) *any person or class of persons to whom the Minister by notification in the Gazette declares that the provisions of this section shall apply*.

(3) The persons referred to in subsection (2) and the Registrar of Criminals are by this Code bound to state the truth in reports made under their hands.

(Emphasis added.)

[23] However sub-s 2(f) confers powers upon the Minister to *gazette* other person or other class of persons to prepare reports on any person, matter or thing referred to the department for examination or analysis to whom the provisions of s 399 of the CPC shall apply. The honourable Minister by *Gazette* Notification PU(B) 324 of 2004 has *gazetted* that science officer employed by the chemistry department is a class of persons to whom the provisions of s 399 of the Criminal Procedure Code shall apply. The *Gazette* Notification was made pursuant to sub-s 399(2) of the CPC is reproduced for easy reference.

In exercise of the powers conferred by paragraph 399(2)(f) of the Criminal Procedure Code Act [Act 593], the Minister declares that the Science Officers employed in the Chemistry Department, Malaysia and who prepared reports on any person, matter or thing referred to the Department for examination or analysis, is a class of persons to whom the provisions of section 399 of the Criminal Procedure Code shall apply.

(2) The declaration under paragraph (1) shall apply to the Science Officers for the period that they remain employed in the Chemistry Department, Malaysia.

Dated: 3 August 2004

[KSTAS, 260.010/A002B Jil. 3; PN (PU) 244/III

DATO' MOHD RADZI SHEIKH AHMAD

Minister in the Prime Minister's Department

[24] The issue as to whether the admissibility of the chemist report in the drugs case surfaced in the case of *Zulkifli bin Md Rodzi v Public Prosecutor* [2013] 3 MLJ 745; [2013] 3 AMR 263 where the issue before the Court of Appeal was whether the chemist report tendered as an exhibit by the chemist ('SP5') whose status is referred to as 'Pegawai Sains Jabatan Kimia' employed by the chemistry department was admissible in court and had satisfied the criteria under s 399 of the CPC. The court held that on evidence, it was clear that SP5 is not a government chemist even though her functions relate to the work of a chemist. The court further held that the report, if not prepared by a government chemist, is inadmissible and has no relevance for that purpose of s 399 of the CPC even though it was couched as a report under the said provision. The court further held that it is trite that where there is a special procedure prescribed under the Act then the general provisions found in the Act or other Acts cannot be followed. Hence the chemist report cannot be admitted under s 45 of the Evidence Act 1950. Therefore Court of Appeal held that s 399 of the CPC does not apply and the report remains inadmissible.

[25] The Court of Appeal by a different panel revisited the same issue in the case of *Shahrizal bin Abdul Ghani v Public Prosecutor* [2014] 1 MLJ 769 where one of the issues raised in the appeal was the admissibility of chemist report under s 399 of the CPC in order to prove that the subject matter of the charge is a 'dangerous drug' as defined in s 2 of the DDA 1952. In this case the seized drugs were sent to Puan Rosni bt Hamid ('the deceased') whose status was as a 'Pegawai Sains' and not a government chemist under s 399(2)(c) of the CPC for chemical analysis and via chemist report exh P22, confirmed that the drug analysed were cannabis, a dangerous drug, having a net weight of 4420g. Learned counsel submitted that s 399 of the CPC does not apply and the report remains inadmissible although no objection was taken and referred to the case of *Zulkifli bin Md Rodzi*. The evidence of SP7 the Director of Penang Chemistry Department confirmed that the deceased is a 'Pegawai Sains' and not a government chemist under s 399(2)(c) of the CPC. The court however agreed with the submission of the prosecution that the notification of declaration which in effect is the effective recognition that science officer employed by the chemistry department is a class of persons to whom the provisions of s 399 of the CPC shall apply and whose report shall be given in evidence, without the makers being required to attend as witnesses, provided that the precondition of service of a copy of the report as laid down in the section had been strictly complied with. The court also held that it is trite law that under s 57(1) of the Evidence Act 1950, the court must take judicial notice of all laws or regulation having the force of law now or heretofore in force or hereafter to be in force in Malaysia or any part thereof. This view has the blessing of the Federal Court in *Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor; Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66 where the court disagreed with the decision in *Samivellu v Public Prosecutor* [1972] 1 MLJ 28 that a court is

only bound to take judicial notice of any regulation when the relevant *Gazette* Notification is either quoted in the charge or adduced in evidence. Raja Azlan Shah FJ (as His Highness then was) said at p 76:

> I agree with the learned Lord President that *Samivellu v PP* [1972] 1 MLJ 28 was wrongly decided. Proclamation PU(A) 148/69 is the law which the court can take judicial notice.

[26] Finally, the court in *Shahrizal*'s case held that in *Zulkifli bin Md Rodzi* the court's attention was not drawn to the *Gazette* Notification PU(B) 324 of 2004 and was of the view that the decision of the court in that case could have been different if the parties had drawn the court's attention to it.

[27] In *Kamarul Farkaruddin Mohamed lwn Public Prosecutor* [2013] 7 CLJ 636 where the court discussed the same issue as to whether the analysis on the urine specimen by a science officer who was employed by 'Makmal Dadah dan Penylidikan, Jabatan Patologi, Hospital Kuala Lumpur' whose status was not as a medical officer nor as a chemist was a qualified person within the meaning of s 31A(1A) of the DDA 1952. The court held that the status of a science officer employed other than by the chemistry department for purposes of admissibility of the chemist report pursuant to s 399(1) of the CPC was not a qualified person under s 31A(1A) of the DDA 1952.

[28] Reverting to the facts of the instant case, the science officer who conducted the examination and analysis on the urine specimen on both applicants was employed by the 'Makmal Dadah Dan Penyelidikan, Jabatan Patologi, Hospital Kuala Lumpur' and had described himself as a 'Pegawai Sains (Ahli Kimiahayat)'. None of the parties in the proceeding had alluded the court to the effect of the *Gazette* Notification PU(B) 324 of 2004. The central plank of the argument was predominantly on whether the amended s 31A (1AA) had a retrospective or prospective effect. However the court felt that a discussion is necessary to consider the whether the *Gazette* Notification by the honourable Minister would include a science officer employed by 'Jabatan Patologi, Hosipital Kuala Lumpur' as class of persons to whom the provisions of s 399(2)(f) of the CPC shall apply. The court was of the view the *Gazette* Notification PU(B) 234 of 2004 does not apply to a science officer employed by the 'Jabatan Patologi, Hospital Kuala Lumpur as a class of persons to whom s 399(2)(f) shall apply. The *Gazette* Notification only applies to a science officer employed by the chemistry department and not by any other department which is governed by the s 31A(1AA) of the DDA (Amendment) Act 2014.

[29] The upshot, is that the respondent cannot rely on the *Gazette* Notification as it does not include a science officer employed other than by the chemistry department and neither can the respondent also rely on the Amended 2014 Act which came into force on 15 February 2014 and the

alleged offence was committed on 13 Septmeber 2012. The court also held that the amended Act 2014 is not retrospective but prospective and to interpret it otherwise would infringe art 7(1) of the Federal Constitution which states that no person shall be punished for an act or omission which was not punishable by law when it was done. The court was of the view that if the case was to proceed for trial the evidence of the chemist report on the urine specimen of the applicants is inadmissible as it did not comply with s 31A(1A) of the DDA 1952 and s 31A(1AA) of the Amendment Act 2014 is inapplicable as the offence committed was before the amendment had come into force.

[30] For the reasons as adumbrated above and in all the circumstances, the court allowed the applicants' reliefs sought in the application prayed for.

Application allowed.

Reported by Kanesh Sundrum